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Supreme Court, U.S.
FILED
SEP 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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By this appeal, Consolidated Edison Company of New York, Inc. ("Con Edison" or "appellant") challenges the validity of an order of the Public Service Commission of the State of New York ("the Commission" or "appellee") prohibiting all utilities subject to the jurisdiction of the Commission from "utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the [utilities' positions] on controversial matters of public policy" (Appendix F, p. 58a).[1] Appellant's Jurisdictional Statement and appellee's Motion to Dismiss Appeal or Affirm Judgment Below ("Motion") bring into

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[1] The reference is to the appendix filed with appellant's jurisdictional statement.

sharp focus the numerous, substantial federal questions presented for this Court's consideration by this appeal.

The Nature of the Ban

The first issue involves the nature of the Commission's ban.[2] The Commission argues that its ban is not a content-based restriction and that it is consistent with several of this Court's decisions (Motion, p. 8). The decisions relied on by the Commission involved either regulation by the government of expression on its own property (*Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974); *Greer* v. *Spock,* 424 U.S. 828 (1976)), or regulation of sexually-oriented materials (*Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970)). None of the cases involved a prohibition on the use of private property for the communication of one's views on matters at the core of the First Amendment. Allowing the Court of Appeals' judgment to stand would involve a significant expansion of the principles of the cases relied on by the Commission. Before such a result is permitted, its ramifications for free speech should be fully considered by this Court.

The Adequacy of the Asserted State Interests

In our jurisdictional statement (at pp. 19-27), we discussed the issues raised by the Court of Appeals' holding that protection of the privacy of the home from unwanted communications is a state interest sufficient to justify the prohibition on the mailing of messages at the core of the

[2] The nature of the ban determines the appropriate standard of review. A stringent standard of review is required for content-based restrictions, whereas a less exacting scrutiny has been applied to time, place, and manner regulations. Appendix A, pp. 8a-9a. In our view, none of the various justifications offered by the Commission meet either test.

First Amendment. In its Motion (at pp. 11-17), the Commission advances several other state interests which it claims justify its ban. Foremost among these is the claim that the ban is needed to assure that ratepayers are not forced to subsidize the dissemination of the views of utility management. The Commission argues that absent the ban, "the ratepayer will . . . be compelled to subsidize the billing process, a forced subsidy found impermissible in *Abood*",[3] (Motion, p. 16 n. 6). The issue is thus raised as to whether the use of bill inserts by utilities, at no cost to ratepayers, constitutes a subsidy of utility management by ratepayers.

In *Abood* the Court held that a complaint filed by governmental employees, who were compelled pursuant to state law to pay union dues in order to retain their jobs, stated a cause of action for violation of their First Amendment rights to the extent their dues were used by the union for political purposes unrelated to collective bargaining to which the complaining employees objected. This Court found that the facts alleged in the *Abood* complaint, if proved, would make out a case of subsidy because use of the employees' dues by the union for political purposes unrelated to collective bargaining resulted in the imposition of higher dues than the employees would otherwise have paid. In sharp contrast, in the case at bar, the use of bill inserts by utilities to express their views costs ratepayers nothing, as it is undisputed, and Special Term so held, that the cost of mailing bills to customers would be the same whether or not the inserts in question were included with the bills. Appendix C, pp. 26a-27a. No customer will pay one single penny more on account of the bill inserts than the rates established by the Commission as reasonable and necessary for the utility service provided. Application of the "forced subsidy" doctrine in these cir-

[3] *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977).

cumstances would involve another significant restriction of the free expression of ideas. This issue also warrants full consideration by this Court.

The other issue raised by the Commission's "forced subsidy" argument is whether imposition of a total ban on the use of bill inserts, rather than elimination of the subsidy, is an appropriate remedy if a subsidy is found to exist in this case. The Commission argues that closing off the billing process for the disseminating of the utilities' views is the proper solution to the "forced subsidy" problem (Motion, p. 16). This view is in conflict with *Abood* in which the Court indicated that an injunction prohibiting the union from expressing its views on political matters would be violative of the First Amendment, *id.*, 431 U.S. at 238.

Other Issues

The papers before the Court also raise questions as to whether the Commission's bill insert ban leaves open ample alternative channels for communication of the utility's positions on controversial matters of public policy and whether the Commission's order is so vague as to deprive appellant of its liberty or property without due process of law. These issues are fully discussed in our jurisdictional statement (at pp. 27-31).

CONCLUSION

For the reasons stated in our jurisdictional statement and herein, probable jurisdiction should be noted.

Respectfully submitted,

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September 7, 1979